

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of	)	
	)	
D G	)	OAH No. 15-1434-MDE
_____	)	Agency No.

**DECISION ON TIMELINESS**

**I. Introduction**

D G appealed the action of the Division of Public Assistance (“Division”) in imposing a penalty on him for transferring an asset for less than its market value. The Division rejected Mr. G’s appeal as untimely. Mr. G then requested a hearing on the timeliness issue.

The hearing was held on November 24, 2015. Mr. G did not appear, but he was represented by his conservator E N and attorney Paula Jacobson, both of whom appeared in person. The Division was represented at the hearing by Sally Dial, who appeared telephonically.

The date on which Mr. G submitted his request for a hearing was disputed by the parties. This decision finds that Mr. G met his burden of establishing by a preponderance of the evidence that his request for hearing was submitted on or about November 3, 2014, well within the 30-day period for appealing the penalty in question. Accordingly, the “non-referral” of Mr. G’s appeal is reversed; his appeal should go forward on the merits.

**II. Facts**

Mr. G is 92 years old and resides in an assisted living home. He receives “waiver” benefits that are paid for by Medicaid, and his Medicaid eligibility is administered by the Division. Mr. G apparently sold a property in 2012 for substantially less than market value, which is an action that negatively impacted his Medicaid eligibility. As a result, the Division issued a notice to Mr. G on October 13, 2014, stating that his Medicaid eligibility would essentially be suspended while he served an “asset penalty period” from September 1, 2014 to October 5, 2014.

Mr. G’s conservator, Ms. N, testified that she faxed a request for hearing regarding the penalty to the Division on November 3, 2014.<sup>1</sup> As support for her testimony on this question,

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<sup>1</sup> It is clear from statements made by Ms. N on the record, and by Ms. Jacobson in her pre-hearing brief, that Mr. G does not dispute the imposition of the penalty or its amount; he disputes only the start date of the penalty period imposed by the Division.

Ms. N submitted a fax verification sheet showing that on that date, a three page fax was sent from her office at No Name to (907) 258-2141, which is the fax number for the Division. Ms. N testified that the three-page fax included a cover sheet, a copy of the Division's October 13 asset penalty notice, and Mr. G's request for hearing regarding the penalty period. She submitted a copy of the full fax package as an exhibit in this hearing.

Ms. N received no response from the Division regarding the November 3, 2014 request for hearing. On May 18, 2015, she sent a letter to the Division asking, among other things, why she had received no response to the November request for hearing. Ms. N hand-delivered the letter to the Division, and she included with it a copy of the three-page fax package and the fax verification sheet from November. She still received no response.

In early October, 2015 Ms. N submitted a request for hearing to the Division regarding another aspect of Mr. G's Medicaid eligibility. During a pre-hearing conference regarding that matter, Ms. N raised the issue regarding the November 2014 request for hearing and asked Division staff to look into why she had never received any response. Ms. Dial reviewed the Division's files on Mr. G and was able to locate a copy of the May 18, 2015 letter and the November fax package that had been submitted with it. However, she was unable to locate any confirmation in Mr. G's file that the November package itself had been received in November, 2014.

Subsequently, during a status conference Ms. Dial informed Ms. N that the Division would process the request for hearing conveyed with the May 18, 2015 letter, would deem it to have been filed on May 18, 2015 and would likely reject it as untimely filed, because it was filed more than 30 days after the October 13, 2014 notice. She stated that the Division had no proof in its files that the November 3, 2014 request for hearing had actually been filed on November 3, 2014. She explained that, because the fax verification sheet submitted by Ms. N did not include an image of the first page of the content of the fax, the Division had no way of knowing whether perhaps some other three-page fax had been sent by Ms. N to the Division on that date. Ms. Dial also stated that she had no explanation regarding why the Division had not responded to the request for hearing when it had been received in May, 2015.

Consistent with Ms. Dial's comments to Ms. N, the Division determined the hearing request to be untimely filed and sent it to the Office of Administrative Hearings as a "non-referral." Ms. N then appealed the non-referral on Mr. G's behalf and requested this hearing.

### **III. Analysis and Ruling**

Under 7 AAC 49.030, a request for hearing in a public benefits case of this type must ordinarily be made "not later than 30 days after the date of the [required] notice." The Department of Health and Social Services is authorized to entertain a hearing request made after the time limit "only if the administrative law judge finds . . . that the request for a hearing could not be filed within the time limit."<sup>2</sup> This high standard can be relatively difficult to meet. When an appeal is untimely under 7 AAC 49.030, Department of Health and Social Services regulations provide very little discretion. In most such situations, the administrative law judge is required to dismiss the appeal.<sup>3</sup>

In this case, however, I find by a preponderance of the evidence that Ms. N did submit a timely appeal for Mr. G regarding the Division's October 13, 2014 imposition of the asset penalty period. It is more likely than not that the appeal was timely submitted and the Division simply misfiled it. This finding is based on Ms. N's very credible testimony regarding her filing of the appeal on November 3, as well as the fax verification sheet confirming that a three-page fax was sent from her office and received by the Division on November 3. The only other possible explanation for the fax verification is that Ms. N sent another three-page fax to the Division on November 3, 2015 and then used the verification from that fax to support a fraudulent claim in this case. I find that explanation to be implausible, highly unlikely, and unsupported by any evidence in the record.

In response to Ms. Dial's statement at the hearing that the Division is required to have proof that a request for hearing has been timely filed, Ms. N's counsel made the persuasive argument that even if a request for hearing were submitted by certified mail with a request for a return receipt, the certified mail receipt would not provide any more proof of the content of the package sent by certified mail than Ms. N's fax verification sheet. This would mean that, if one were to take the Division's position on this issue to its ultimate conclusion, the Division would

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<sup>2</sup> 7 AAC 49.030(a).

<sup>3</sup> 7 AAC 49.100(5). Dismissal authority in this situation is delegated by regulation to the administrative law judge; no "proposed decision" process under AS 44.64.060 is contemplated.

accept only hand-delivered filings with a copy date-stamped by Division staff as proof of a timely filing (or arguably faxes where the verification sheet actually showed the content of the first page). Any other type of filing would be subject to question by the Division if it could not be located in the Division's files.<sup>4</sup>

#### **IV. Conclusion and Order**

Because Mr. G's request for hearing was timely filed by Ms. N on November 3, 2014, the Division's untimeliness defense is not established, and the appeal shall go forward on the merits. A status conference will be scheduled in the near future so that the appeal hearing can be placed on the OAH calendar.

Dated this 30<sup>th</sup> day of November, 2015.

*Signed* \_\_\_\_\_  
Andrew M. Lebo  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

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<sup>4</sup> An alternate way of viewing this decision, within the context of 7 AAC 49.030(a), is that "the request for hearing could not be filed [by Ms. N] within the time limit" because timely filing was prevented by the Division's mishandling or misfiling of the November 3, 2014 fax.